Supreme Court, U.S.
FILED

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CASE NO._____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1997

JOHN HUBERT MOLL,

PETITIONER,

vs.

THE STATE OF FLORIDA

RESPONDENT.

On Petition for Certiorari Pursuant to 28 U.S.C. § 1254(1)

PETITION FOR WRIT OF CERTIORARI TO THE FIFTH DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

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ATTORNEY FOR PETITIONER

QUESTION PRESENTED FOR REVIEW

Whether the Court should grant certiorari to examine whether Petitioner's Free Speech Constitutional Rights were violated by the Brevard County (Florida) Public Nudity Ordinance 95-21 and by the failure to find that Petitioner qualified under exemptions that specifically allow protected-as-speech nudity under the ordinance, and that Petitioner complied with the ordinance and did not "knowingly and intentionally" appear illegally nude in a public place?

PARTIES IN THE COURT BELOW

Petitioner, John Hubert Moll was the defendant in the trial court and was the Defendant-Appellant in the Fifth District Court of Appeal for the State of Florida. The Respondent, The State of Florida was the Plaintiff and was the Plaintiff-Appellee in the Fifth District Court of Appeal for the State of Florida.

RULE 29.1 STATEMENT

There are no corporations involved and, therefore, no subsidiary corporations.

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ON PETITION FOR WRIT OF CERTIORARI
TO THE FIFTH DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA

The Petitioner, John Hubert Moll, respectfully prays that a writ of Certiorari issue to review the judgment of the FIFTH DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA entered herein.

OPINIONS BELOW

(A) A copy of the non-published opinion dated December 12, 1997 of the Fifth Circuit Court of Appeals for the State of Florida and affirming the finding of guilt of Petitioner is joined as Appendix "A".

(B) A copy of the orally transcribed trial court opinion finding Petitioner guilty is joined as Appendix "B".

(C) A copy of the non-published opinion of the Circuit Court acting in its appellate capacity and denying Petitioner's direct appeal is joined as Appendix "C".

(D) A copy of the non-published order dated February 9, 1998 and denying Petitioner's Motion for rehearing, for rehearing en banc or the certify question is joined as Appendix "D".

(E) A copy of the Brevard County (Florida) Public Nudity Ordinance 95-21 is joined as Appendix "E".

JURISDICTION TO REVIEW

Jurisdiction of this Court is invoked under Title 28 U.S.C. section 1254(1) and Howelett v. Rose, 496 U.S. 356, 110 Sup.ct. 2430, 110 L.Ed.2d 332 (1990). The Fifth District Court of Appeal in Florida entered its denial of Petitioner's Petition for Certiorari review of the Decision of the Circuit

Court For Brevard County, acting in its Appellate Capacity, affirming the conviction and sentence of petitioner.

STATUTORY PROVISIONS INVOLVED

The Ordinance under which petitioner was convicted and sentenced, the "Brevard County Public Nudity Ordinance", is attached as Exhibit B, and it provides in relevant part that:

Section 3. u. provides as follows:

> "the exemptions contained in this ordinance provide adequate protection to the persons who, without such exemptions, might be prevented or discouraged by this, ordinance from exercising constitutionally protected rights; and...".

Section 4. Definitions. b. provides as follows:

> "'Nude' means to openly display or expose, the human male or female genitals or pubic area with less than a fully opaque covering; or...."

Section 6. Exemptions. Provides as follows:

> "The offense of public nudity contrary to Section 5 above shall not be deemed to have occurred in any of the following instances:
>
> b. when the conduct of being nude cannot constitutionally be prohibited by this

ordinance because it constitutes a part of a bona fide live communication, demonstration or performance by such person wherein such nudity is expressive conduct incidental to and necessary for the conveyance or communication of a genuine message or public expression, and is not a guise or pretense utilized to exploit nudity for profit or commercial gain (see, for example, Barnes v. Glen Theatre Inc., _ U.S. 111 S.Ct 2456, 115 L. Ed.2d 504 [1991]; and Hoffman v. Carson, 250 So . 2d 891 [Fla. 1971]); or

c. when the conduct of being nude cannot constitutionally be prohibited by this ordinance because it is otherwise protected by the United States Constitution or Florida Constitution under existing judicial decisions; or... "

STATEMENT OF THE CASE

On May 18, 1995 the Brevard County board of County Commissioners adopted an ordinance with the title "Brevard County Public Nudity Ordinance" which included certain exemptions listed in section (6) and contained in a definition of "Nude" provided in the ordinance (see excerpts supra, and the ordinance attached as exhibit B).

On April 14, 1996 Petitioner was at a public beach in Brevard County wearing an expressive outfit of his own choice which included a "Vote for Clinton/Gore '96" sign. It is that message that Petitioner intended to communicate to viewers.

Viewers of Petitioner included members of the Brevard County Sheriff's Department who proceeded to

arrest and charge petitioner with violating the aforesaid nudity ordinance.

On May 14, 1996 Petitioner filed a Motion to Dismiss under Florida Rules of Criminal Procedure 3.190(c)(4). This motion was heard considered and denied by the Honorable Kenneth Friedland on July 5, 1996.

Petitioner's trial occurred on July 18, 1996 at which the state produced no evidence that he did anything that would have removed the protection afforded him by the ordinance's exemptions when proclaiming "Vote for Clinton and Gore" by sign and other political statements.

At the close of the government's case on July 18, 1996, the Court Acquitted petitioner under Florida Statute § 877.03. Indeed, the government stipulated it was withdrawing the Florida Statute § 877.03 allegation.

At the close of all evidence, Petitioner made a motion for judgment of acquittal and renewed all previous motions which were denied.

The Petitioner was found guilty and sentenced to 6 months probation and ordered to pay cost of investigation and a $50.00 fine.

Appeal was pursued and the conviction was affirmed by the Circuit Court for Brevard County acting in its appellate capacity on July 30, 1997.

A Petition for Certiorari review of the Decision of the Circuit Court For Brevard County, acting in its Appellate Capacity was denied by Fifth district Court of appeal for the State of Florida on December 12, 1997.

Petitioner's "motion for rehearing, for rehearing en banc or to certify question" was denied by the Fifth District Court of Appeal for the State of Florida on February 9, 1998.

This Petition for writ of certiorari to the United States Supreme Court followed.

REASONS FOR GRANTING THE WRIT
ARGUMENT: THE NUDITY ORDINANCE IS UNCONSTITUTIONAL AS APPLIED

The Court should grant certiorari to examine whether Petitioner's constitutional rights were violated by the Brevard County (Florida) Public Nudity Ordinance 95-21 and by the failure to find that Petitioner qualified under exemptions that specifically allow nudity under the ordinance, and that Petitioner complied with the ordinance and did not "knowingly and intentionally" appear illegally nude in a public place.

It is here urged that the Brevard County Ordinance 95-21 is unconstitutional as applied in a criminal action against non-commercial political speech that is not lewd or disorderly, and specifically that speech/nudity combination engaged in by the petitioner.

Petitioner respectfully submits that the Fifth District Court of Appeal for Florida overlooked or misapprehended significant controlling points of law. The Court's opinion cites only two cases, Barnes v. Glen Theatre, Inc., 501 U. S. 560, 111 S. Ct. 2456, 115 L. Ed. 2d 504 (1991) and Cafe 207, Inc. v. St. Johns County, 856, F. Supp. 641 (M.D. Fla. 1994), *affirmed*, 66 F. 3d 272 (11th Cir. 1995), *cert. denied*, ___ U. S. ___, 116 S. Ct. 1544, 134 L. Ed. 2d 647 (1996).

Both cases that the Court cites, Cafe 207 and Barnes, were cases involving commercial activity on or about a business and civil actions for declaratory and injunctive relief. In Petitioner Moll's case there was involved serious political speech, (i.e. "Vote for Clinton/Gore 1996," etc) and no commercial speech and Moll's case involved incarcerative action by the government against Petitioner Moll's protected speech at a public forum, and Moll intentionally availed himself of specific sections of the ordinance at issue that permit incidental public nudity and serious political speech such as Petitioner Moll combined, quite unlike the cases cited

in the lower court's opinion. It is important to distinguish Petitioner Moll's case in that Petitioner Moll was engaged in the purest form of Free Speech and that it was Political Speech, and Moll was not engaged in any commercial activity.

In addition, the Court's ruling as it now stands would conflict with the rulings of the United States Supreme Court and the Florida Supreme Court, which clearly articulated that Political Speech is protected by the Free Speech clause of the First Amendment to the United States Constitution and that nudity alone does not remove that protection. Schad v. Borough of Mount Ephraim, 101 S. Ct. 2176 (1981). McGuire v. State, 489 So. 2d 729, (Fla. 1986).

Petitioner seeks reversal of his conviction as was ordered in another case involving a common law writ of certiorari, Goodmakers v. State, 450 So.2d 888 (Fla. 2d DCA 1984).

Petitioner qualified under the exemptions provided by the ordinance, especially 6(c) and he believed he qualified under that exemption, and otherwise did not "knowingly and intentionally" appear illegally nude in a public place, and that the ordinance would otherwise be unconstitutional as applied if Petitioner were not exempt under the ordinance.

The Brevard County Public Nudity Ordinance contains exemptions under 6(b) for expressive conduct and under 6(c) for nudity associated with some mode of expression which itself is entitled to First Amendment protection consistent with Schad and McGuire v. State, 489 So. 2d 729, (1986).

Petitioner maintains that at all times by facts and law, he was entitled to at least one of the exemptions, particularly 6(b) and/or 6(c), arguably both, since they are not mutually exclusive.

In addition, it is petitioner's argument that his conduct was constitutionally protected, and that the ordinance is unconstitutional as applied if it proscribed petitioner's conduct.

In Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975), the United States Supreme Court declared unconstitutional a Jacksonville, Florida ordinance making the showing of nudity in drive-in movies a criminal offense. Holding the ordinance overbroad, the Court said such a ban would cover a nude baby on a bear rug. In dissenting, Justices White, Burger and Rehnquist stated that the majority view would permit actual nudity in public places on the theory that those offended "may merely look the other way."

Cafe 207, Inc. v. St. Johns County, 856 F. Supp 641 (M.D. Fla. 1994) appears to support the petitioner. It is also distinguishable. In that case the Court upheld the constitutionality of a similar ordinance containing similar exemptions. However, that was a civil injunctive relief case involving commercial speech. A distinction should be made between civil injunctive relief cases involving commercial speech and criminal cases involving non-commercial free speech of the type that petitioner was engaged.

The United States Supreme Court more than fifteen years ago clearly articulated that political speech is protected by the Free Speech clause of the First Amendment to the United States Constitution and that nudity alone does not remove that protection. The case was Schad v. Borough of Mount Ephraim, 101 S. Ct. 2176 (1981).

The Florida Supreme Court more than ten years ago said in clear and unambiguous language when nudity is protected as speech. McGuire v. State, 489 So. 2d 729, (1986), "Nudity is protected as Speech...".

CONCLUSION

Based on the foregoing arguments and authorities, Petitioner John Hubert Moll respectfully submits that the petition for writ of certiorari should be granted.

The evidence at trial confirmed that Petitioner was engaged in a protected mode of expression under the protection of the Free Speech clause of the Florida and United States Constitution and by existing Judicial decisions. His mere nudity did not remove such protection at a public forum. Schad is controlling. His conviction should be reversed.

Respectfully submitted,

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APPENDIX A

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA

FIFTH DISTRICT JULY TERM 1997

JOHN HUBERT MOLL, III,
Petitioner,

v. Case No. 97-2395

STATE OF FLORIDA,
Respondent.
----------/

Opinion filed December 12, 1997

Petition for Certiorari Review of Decision
from the Circuit Court for Brevard County,
Acting in its Appellate Capacity.

Ellis Rexwood Curry, IV., Tampa, for Petitioner.

No appearance for Respondent.

PER CURIAM.

DENIED. See Barnes v. Glen Theatre, Inc., 501 U.S. 560, 111 S. Ct. 2456, 115 L. Ed. 2d 504 (1991) and Cafe 207, Inc. v. St. Johns County, 856 F. Supp. 641 (M.D. Fla. 1994), affirmed, 66 F. 3d 272 (11th Cir. 1995), cert. denied, ___ U. S. ___, 116 S. Ct. 1544, 134 L. Ed. 2d 647 (1996).

DAUKSCH, SHARP, W., and PETERSON, JJ., concur.

APPENDIX B

THE COURT: Well, you know, I do find that the County ordinance did not in anyway attempt to prohibit his freedom of speech. No one is telling him he can't wear is arm band. No one is telling him he can't wear campaign buttons. No one is telling him that he can't wear an American flag. No one is telling him that he can't give a political speech. He can do all of these things and he can do them clothed if he wants to. No one is telling him that he can't do any of those things.

Now the question is did he have to be nude in order to do those. The answer is no, he didn't have to be.

So how is it so interconnected that it is part of the freedom of speech and I don't believe it is interconnected. I don't believe that he would have been able to perform his play even if it had not been canceled and that would have been constitutionally acceptable. Just because, you know, if he's out in public and he decides to remove his clothing and he's told you're not allowed to do that and we're going to arrest you, you know, just because he decides I'm going to hold up a campaign sign or I'm going to wear an arm band or I'm going to dance a jig or I'm going to perform a play. That doesn't somehow take this out of realm of the ordinance. This is very different than the cases which allow dancing in a licensed establishment or a play to be performed like Ole Calcutta or something like that. You know, in an establishment that allows that type of activity. I am going to deny the Motion for Judgment of Acquittal, and I'm also going to find that Mr. Moll is guilty of violating the ordinance. Is there any legal reason why he shouldn't be sentenced at this time?

MR. CURRY: No, Your Honor, although I was going to make comments briefly.

APPENDIX C

IN THE CIRCUIT COURT OF
THE EIGHTEENTH JUDICIAL
CIRCUIT, IN AND FOR
BREVARD COUNTY, FLORIDA

APPEAL CASE NO.
96-19352-ACA

JOHN H. MOLL, III,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.
----------/

Decision filed:

Appeal from Brevard County Court,
Kenneth Friedland, Judge.

Ellis Rex Curry, IV, Esq.
Attorney for Appellant.

Mchelle Jackson, Esq.
Attorney for Appellee.

PER CURIUM.
Affirmed.

JACOBUS, Bruce W., HOLCOMB, Charles M.,
JOHNSTON, Lawrence V.,
Judges, concur.

APPENDIX D

IN THE DISTRICT COURT OF APPEAL OF THE
STATE OF FLORIDA
FIFTH DISTRICT

JOHN HUBERT MOLL, III,
Petitioner,

v. Case No. 97-2395

STATE OF FLORIDA,
Respondent.
---/

DATE: February 9, 1998

BY ORDER OF THE COURT:

ORDERED that Petitioner's MOTION FOR REHEARING, FOR REHEARING EN BANC OR TO CERTIFY QUESTION, filed December 26, 1997, is denied.

I hereby certify that the foregoing is
(a true copy of) the original Court order.
/s/ Frank J. Habershaw
FRANK J. HABERSHAW, CLERK

(COURT SEAL)

CC: Ellis Rexwood Curry, IV, Esq.
Hon. Bruce W. Jacobus
Hon. Lawrence V. Johnston, III
Office of the Attorney General, Daytona Beach
Hon. Charles Holcomb

APPENDIX E

BREVARD COUNTY ORDINANCE 95-21

AN ORDINANCE PROHIBITING PUBLIC NUDITY IN BREVARD COUNTY, FLORIDA; DESIGNATING A TITLE; EXPRESSING THE INTENT; SETTING FORTH FINDINGS, PROVIDING DEFINITIONS; CREATING EXEMPTIONS; PROVIDING FOR AN AREA EMBRACED; PROVIDING FOR PENALTIES; PROVIDING FOR SEVERABILITY; AND PROVIDING AN EFFECTIVE DATE,

BE IT ORDAINED BY THE BOARD OF COUNTY COMMISSIONERS OF BREVARD COUNTY, FLORIDA.

Section 1. Title. This ordinance shall be known as the "Brevard County Public Nudity Ordinance."

Section 2. Intent. It is the intent of the Board of County Commissioners, in enacting this ordinance, to prohibit the conduct of being nude in public places for the purpose of protecting societal order and morality and suppressing the adverse secondary effects that public nudity generates, as more specifically described in the findings. It is the intent of this ordinance to protect and preserve the health, safety, and welfare of the people of Brevard County by prohibiting any person from knowingly or intentionally appearing nude in a public place, or knowingly or intentionally causing or permitting another person to appear nude in a public place, within the municipalities and unincorporated areas of Brevard County embraced by this ordinance, subject to certain exceptions.

Section 3. Findings.

The Board of County Commissioners finds and determines as follows:

a. since the beginning of civilization, appearing nude in

a public place which is not a public place provided or set apart for nudity has been considered improper (see Moffett v. State, 340 So.2d 1155, 1156, n.3 [Fla. 19771; and

b. appearing nude in a public place which was not a public place provided or set apart for nudity was a criminal offense at common law and was considered an act malum in se (wrong in itself); and

c. appearing nude in a public place which is not a public place provided or set apart for nudity is engaging in conduct which often serves to impose such person's nudity on others who did not seek it out, who are unable to reasonably avoid observing it, and who may be offended or distressed thereby and

d. there is a location in Brevard County, specifically the extreme north end of Playalinda Beach (the area north of parking area #13), which has historically been frequented by nude sunbathers, and

e. efforts by the State and Federal governments to apply Florida criminal statutes have been rejected by the courts since, under certain applicable criminal laws, nudity alone cannot be prosecuted without proof of lewd and lascivious conduct, and

f. since the rulings of the courts on the non-enforceability of criminal statutes against persons merely appearing nude on Playalinda Beach, people have begun appearing nude on other portions of the beach which have not been historically used by nude sunbathers, and

g. since the above referenced rulings, there has been a documented increase in the number of complaints about persons engaged in open displays of sexual activity as well as lewd and lascivious conduct on ail portions of Playalinda Beach; and

h. since the above referenced rulings, there has been a documented increase in the number of complaints about persons flaunting their nudity in front of persons,, including children, who chose not to appear nude in public places, and

i. the Board finds that appearing nude in a public place, including a beach area such as Playalinda, which is not a public place provided or set apart for nudity is still subject to general disapproval by the people of Brevard County; and

j. nude sunbathing is not constitutionally protected [South Florida Free Beaches v. City of Miami], and

k. the appearance of persons in the nude in places which are not public places provided or set in public apart for nudity has been found, by other communities in Florida, to have generally increased incidents of prostitution, sexual assaults and batteries; attracted other criminal activity to the community; encouraged degradation of women and facilitated other activities which break down societal family structures and values; and

l. without regulation, appearing nude in a public place which is not a public place provided or set apart for nudity constitutes conduct which adversely affects the health, safety and welfare of members of the public who chose not to appear nude in public places; and

M. Brevard County is a family oriented area; and

n. Brevard County beaches and northern Brevard County is an area that is known for and whose economy is largely dependent upon tourists and family oriented attractions, such as the Kennedy Space Center, and

o. the Board finds from correspondence that Board members have received, that nudity on public beaches, in particular Playalinda beach, has caused some tourists to express their intent not to frequent Brevard County beaches, and

p. regulation of public nudity will protect and preserve the public health, safety, and welfare of the people of Brevard County by restricting, to the fullest extent allowed by the. United States Constitution and Florida Constitution, the act of being nude to non-public places or public places provided or set aside for nudity; and

q. non-regulation of persons appearing nude in public

places which are not public places provided or set apart for nudity within the Brevard County would encourage entities and persons to exploit nudity for profit or commercial gain and to advertise outside of Brevard County and the State of Florida the availability of and opportunity for nudity in public places which are not places provided or set apart for nudity within Brevard County, and

r. non-regulation of persons appearing nude in public places which are not public places provided or set apart for nudity would encourage the influx into Brevard County of persons seeking to observe and/or participate in such nudity, and to participate in the secondary effects of such nudity, including disorderly, harmful, illegal and open sexual activity that is associated therewith, thereby inhibiting open access to public facilities, and causing potential harm to the health, safety and welfare of Brevard County residents and other persons who choose not to appear nude in public places; and

s. the prohibitions contained in this Ordinance are the most reasonable and minimum restrictions required so as to regulate the conduct of public nudity which the Board finds to be conduct adverse to public order and morality within Brevard County, when such conduct occurs in a public place which is not a public place provided or set apart for nudity; and

t. states may regulate the conduct of appearing nude in public places which are not public places provided or set apart for nudity (see Barnes v. Glen Theatre. Inc. 111 S.Ct 2456, 115 L. Ed.2d 504 [19911); and

u. the exemptions contained in this ordinance provide adequate protection to persons who, without such exemptions, might be prevented or discouraged by this ordinance from exercising constitutionally protected rights; and

v. this ordinance regulates conduct, not speech.

Section 4. Definitions.

a. "Entity" means any proprietorship, partnership, corporation, association, business trust, joint venture, joint-stock company or other for profit and/or not for profit organization.

b. "Nude" means to openly display or expose, the human male or female genitals or pubic area with less than a fully opaque covering; or

2) any portion of the anal cleft or cleavage of the male or female buttocks. Attire which is insufficient to comply with this requirement includes, but is not limited to, G-Strings, T-Back bathing suits, thong bikinis, dental floss or any other clothing or covering that does not completely and opaquely cover the anal cleft or cleavage of the male or female buttocks; or

3) the portion of the human female breast directly or laterally below a point immediately above the top of the areola with less than a fully opaque covering. This definition shall include the entire lower portion of the human female breast, including the areola and nipple, but shall not include any portion of the cleavage of the human female breast exhibited by a dress, blouse, shirt leotard, bathing suit or other clothing, provided the areola is not exposed; or

4) human male genitals in a discernibly turgid state, even if completely and opaquely covered.

For purposes of this definition, body paint, body dye, a tattoo, latex, or any similar substances shall not be considered an opaque covering.

c. "Person" means any human being at least ten (10) Years of age.

d. "Public place provided or set apart for nudity" means an enclosed public restroom; an enclosed functional shower or locker room facility; an enclosed sauna; a motel room or hotel room designed and intended or sleeping accommodations; or at the enclosed or isolated location of a

bona fide private club whose membership as a whole engages in social nudism or naturism (a nudist resort or camp); and any similar public places in which nudity is necessarily and customarily expected outside of the home (example: doctor's office or hospital) or where a nude person would have a constitutionally protected expectation of privacy. The term also includes any area or land:

1) which is under the ownership or control of the Federal or State government and

2) which the Federal or State government has specifically and expressly designated, with signage or otherwise, as a location where nude sunbathing is permitted. Signs which only warn of possible encounters with nude sunbathers, or any similarly worded sign, shall not be deemed to constitute a specific or express designation of an area for nude sunbathing.

e. "Public Place" means any location open to the common and general use, participation, or enjoyment of the public where the public is present or likely to be present, or any location where the public is invited and is free to go upon special or implied invitation, or any location where a person may reasonably be expected to be observed by the public. A public place includes, but is not limited to, a street, sidewalk, park, beach, business or commercial establishment (whether for profit or not for profit and whether open to the public at large or where entrance is limited by a cover charge or membership requirement), bottle club, hotel, motel, restaurant, night club, country club, cabaret, or meeting facility utilized by a religious, social, fraternal or similar organization.

Section 5. Public Nudity. Subject to the exemptions set forth in Section 6 below, it shall be unlawful for any person to knowingly or intentionally:

a. appear nude in a public place; or
b. cause or permit another person to appear nude in a public place; or
c. sunbathe nude in a public place; or
d. appear nude in a public place in such a manner as to be in violation if §877.03, Florida Statutes; or
e. appear nude in a public place in such a manner as to be in violation of the common law of England as adopted by §775,01, Florida Statutes.

Section 6. Exemptions. The offense of public nudity contrary to Section 5 above. shall not be deemed to have occurred in any of the following instances:
a. when a person appears nude in a public place provided or set apart for nudity, and such person is nude for the sole purpose of performing a legal function that is customarily intended to be performed within such public place, and such person is not nude for the purpose of obtaining money or other financial gain for such person or for another person or entity; or
b. when the conduct of being nude cannot constitutionally be prohibited by this ordinance because it constitutes a part of a bona fide live communication, demonstration or performance by such person wherein such nudity is expressive conduct incidental to and necessary for the conveyance or communication of a genuine message or public expression, and is not a guise or pretense utilized to exploit nudity for profit or commercial gain (see, for example, Barnes v. Glen Theatre Inc., _ U.S. _ , 111 S.Ct. 2456, 115 L. Ed.2d 504 [1991]; and Hoffman v. Carson, 250 So.2d 891 [Fla. 1971]); or
c. when the conduct of being nude cannot constitutionally be prohibited by this ordinance because it is otherwise protected by the United States Constitution or Florida Constitution under existing judicial decisions, or
d. where a person appears nude in any area which has

been designated, by the Federal or State government as a public place provided or set apart for nudity; or

e. when a mother is breast-feeding her baby; or

f. where a person appears nude in any area which is owned or controlled by the Federal or State government and it is judicially or legislatively determined that the County has no jurisdiction or authority to exercise its police power in that area.

Section 7. Violation of Section 5/Penalty. Any person who violates Section 5 above shall be prosecuted in the same manner as misdemeanors are prosecuted. Upon conviction, a violator shall be punished by a fine not to exceed $500 or by imprisonment in the county jail not to exceed 60 days, or by both such fine and imprisonment. This enforcement procedure and penalty for violations of this ordinance is adopted under the express authority of sec. 125.69(1) Florida Statutes.

Section 8. Severability. If any section, subsection, sentence, clause, phrase, word or provision of this ordinance is for any reason held invalid or unconstitutional by any court of competent jurisdiction, such invalid unconstitutional portion shall be deemed a separate, distinct and independent provision, and such holding shall not affect the validity of the remaining portions of this ordinance, provided the remaining portions effectuate purpose and intent of this ordinance.

Section 9. Area Embraced. This ordinance shall be effective in all municipalities and in the unincorporated area of Brevard County.

Section 10. Effective Date. This ordinance shall take effect upon the date of receipt of official acknowledgment from the office of the Secretary of State of the State of Florida, that said ordinance has been filed with that office.